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On Relating Social Sciences to International Law: Three Perspectives

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Abstract

This Essay offers a critical yet constructive reading of the social science approach to international law. In seeking to frame international legal studies alongside the positivistic social sciences, the social science approach has suffered from important methodological deficiencies. Though appearing to be an objective science, the social science approach requires a scholar to make subjective decisions throughout the research process. A reductionistic social science approach to international law risks consolidating existing inequalities and imperialistic institutions in the name of objective science. A healthy interaction between international law and the social sciences requires enriched conceptions of both international law and the social sciences, as well as a proper perspective on their working relationship. This dynamic perspective recognizes the constitutive role of international law in carrying out the social science approach. It further emphasizes the importance of internalizing interdisciplinarity within international legal scholarship itself.

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I. INTRODUCTION

The social science approach to international law, as advocated by Daniel Abebe, Adam Chilton, and Tom Ginsburg, is a recent academic effort to frame international legal studies alongside the positivistic, fact-based, and empirical social sciences. The social science approach starts "with a healthy skepticism about the efficacy of law" and tests "hypotheses about how international law works in practice" through observation and data collection.[1] By describing and explaining what the world is, the social science approach reclaims the methodological rigor, scientism, and legitimacy of international law.

The social science approach should be understood within the context of the law and society movement of American legal academia, which harbors a long-standing tradition of skepticism toward the normative-formalistic concept of law. Its application to international law motivates a wide range of approaches including the New Haven School,[2] economic analysis of international law,[3] international law and international relations,[4] international law as behavior,[5] the empirical turn,[6] the experimental turn,[7] and others. Yet, at a time when international law is increasingly perceived as "indeterminate and illegitimate" in the United States,[8] the call for a social science approach may be understood as an attempt to reclaim its domestic relevance by recourse to empirical methods and scientism.

Contrary to a simplistic polarization between the normative approach and empirical research, this Essay suggests that the relationship between international law and the social sciences is complex and nuanced. A detailed account of their relationship casts light on the possibilities and limitations of the social science approach, and also provides useful insights for developing an inclusive and engaging international legal scholarship.

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1 *See* Daniel Abebe, Adam Chilton & Tom Ginsburg, *The Social Science Approach to International Law*, 22 CHI. J. INT'L L. 1, 19, 5 (2021).

2 *See generally* Oran R. Young, *International Law and Social Science: The Contributions of Myres S. McDougal*, 66 AM. J. INT'L L. 60 (1972); WESLEY L. GOULD & MICHAEL BARKUN, INTERNATIONAL LAW AND THE SOCIAL SCIENCES (1970).

3 *See generally* JACK GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

4 *See generally* Anne-Marie Slaughter Burley, *International Law and International Relations: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993).

5 *See generally* Harlan Grant Cohen & Timothy Meyer, *International Law as Behavior*, *in* INTERNATIONAL LAW AS BEHAVIOR 1 (Harlan Grant Cohen & Timothy Meyer eds., 2021).

6 *See generally* Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT'L L. 1 (2012).

7 *See generally* Jeffrey L. Dunoff & Mark A. Pollack, *Experimenting with International Law*, 28 EUR. J. INT'L L. 1317 (2017).

8 *See* Paul B. Stephan, *Comparative International Law, Foreign Relations Law, and Fragmentation*, *in* COMPARATIVE INTERNATIONAL LAW 57 (Anthea Roberts et al. eds., 2018).

II. SOCIAL SCIENCES WITHIN INTERNATIONAL LAW

The traditional, normative approach to international law is not at all antagonistic to scientism.[9] Instead, the normative approach seeks to build its legitimacy and relevance by a claim to normative objectivity and certainty. Rules are objective, their meanings are ascertainable, and they separate international law from both morality and politics.

Under the normative approach, the main task of international lawyers is to ascertain and clarify rules of international law in an objectively verifiable way. As international law is represented as a system of objective rules and principles, the idea of scientism deeply informs its doctrinal construction. International law is discoverable through a process of neutral scientific inquiry, and the authoritativeness of the norms depends upon the correct application of the scientific method to international law.

The scientific nature of international law is crystalized in the doctrine of its sources. The idea of scientism has been used to enhance the credibility of international law as a discipline in the eyes of politicians and theorists.[10] It also embodies the positivistic tradition of international law.[11] It is no surprise that the rise of positivism is accompanied by the corresponding infusion of scientism into international legal studies.

The normative approach is not blind to sociology, either. Rather, it has its own conceptions of sociology, power, and knowledge. Beneath the construction of the doctrine lies a profound sociological understanding of the international society.[12] For example, positivism reflects the political reality of the monopolistic position of the nation-state in international relations, marginalizing the role of nonstate actors in the making of international law. In recognizing the decentralized structure of international society, positivism also privileges the great powers in the lawmaking process.

A close look at the doctrine of customary international law illustrates the underlying sociology. Secondary rules on the ascertainment of customary law express the sociological reality of international society. The requirement of

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9 *See* Anne Orford, *Scientific Reason and the Discipline of International Law*, 25 EUR. J. INT'L L. 369 (2014).

10 *See* L. Oppenheim, *Science of International Law Its Tasks and Method,* 2 AM. J. INT'L L. 313, 323–24 (1908).

11 *See* Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 18 (1999).

12 For a useful account on positivism from the lens of normative politics, see Benedict Kingsbury, *Legal Positivism as Normative Politics: International Society, Balance of Power and Oppenheim's Positive International Law*, 13 EUR. J. INT'L L. 401 (2002).

concreteness is to render as much as possible the proposed norm in conformity with existing state practice.[13]

There are many telling examples in this regard. For a new rule to emerge, state practice has to be extensive and virtually uniform.[14] Further, the practice of the "specifically affected states" is given full weight.[15] In conceding to the dominant role of great powers, physical acts are weighed more heavily than verbal acts. The "persistent objector" doctrine is practically reserved for those states who can persistently object to an emerging rule, despite it being affirmed by a great majority of states—a possibility only open to a handful of great powers.[16]

In setting the law-making procedures, international law internalizes its perceptions of prevailing social conditions. The sociological account is implicit in the normative approach. Yet, international legal scholars have traditionally stayed silent on those normative ideals about the world. Once entering the realms of the sociological and the political, it would be a self-defeating exercise to an international law project that claims to reject politics and morality. By convention, international lawyers are trained as experts in normative jurisprudence, rather than as social or political scientists. This mindset of avoidance has had structural impacts on the works of international lawyers. It has curtailed the ambition and willingness of international lawyers to engage with external disciplines. It also causes confusion for many who are trapped in the formalistic approach and yet see the political disagreements not surmountable by legal techniques. With the rise of critical international law scholarship in the late 1980s, the objectivity claim of normative international law has decisively fallen apart.

III. SOCIAL SCIENCE APPROACH TO INTERNATIONAL LAW

The social science approach suggested by Abebe, Chilton, and Ginsburg examines the phenomenon of international law by using conventional, empirical, and positivistic social sciences.[17] This external approach may be conveniently referred to as the social science approach to international law. The basic procedure

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13 On the irresolvable tension between concreteness and normativity, see generally MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2005).

14 *See* North Sea Continental Shelf (FRG/Den.; FRG/Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 74 (Feb. 20).

15 *Id.*

16 In rediscovering the importance of the persistent objector doctrine due to the changing conditions of international lawmaking, Ted Stein claimed her work to be "an exercise in the sociology of international law." *See* Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457, 481 (1985). A critical reading of the persistent objector doctrine is well argued by B. S. Chimni, *Customary International Law: A Third World Perspective*, 112 AM. J. INT'L L. 1, 23–25 (2018).

17 *See generally* Abebe et al., *supra* note 1.

is to start with a research question, develop a hypothesis, then verify or falsify the hypothesis through observation and data collection. In reducing and limiting its research task to descriptive engagement without a normative commitment, the social science approach advocates a revitalization of the scientific enterprise of international law.

In a sense, the social science approach and the normative approach share a common interest in scientism and objectivity despite the profound difference between the two approaches. The social science approach replaces the normatively-committed objective rules with a new set of empirically-committed objective rules. The scientism of the social science approach also needs to be demystified.

The social science approach is premised upon the full separation between the subjective and the objective.[18] It further assumes the objective being real, fixed, unmalleable, and organized – capable of scientific studies without subjective intervention. This approach is epistemologically incomplete, if not completely impossible. First, no social science is completely neutral, objective, and value-free. Social sciences are as politically informed as international legal studies. The application of the social science approach to international law requires a scholar to make many subjective choices throughout the research process. In defining the research question, setting the context, identifying the variables, relating variables as cause and consequence, collecting and interpreting the data, establishing the causal link, generalizing the research outcomes, and more, one is constantly called to make subjective decisions.[19] Those delicate decisions are not readily accessible in the disciplinary toolboxes of social sciences or international law. Instead, one must make decisions creatively.

How contrary state practice is treated in identification of customary international law provides an illustrative example. Torture is prohibited by the 1984 U.N. Convention against Torture.[20] Given that the practice of torture is widely found across the world, the question immediately arises whether customary international law authorizes or prohibits torture.[21] The techniques employed by the traditional approach elaborate and define what counts as state practice. One answer is to exclude those practices of torture from the purview of "state

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18 *See* BARRY HINDESS, PHILOSOPHY AND METHODOLOGY IN THE SOCIAL SCIENCES 138–39 (1977).

19 The range of subjective selection is manifestly acknowledged in the classics on quantitative social research. *See, e.g.*, GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH (1994).

20 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

21 This was a point of debate between Arthur Weisburd and Anthony D'Amato in the 1980s on whether the prohibition of torture was purely conventional by nature. *See* Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1 (1988); Anthony D'Amato, *Custom and Treaty: A Response to Professor Weisburd*, 21 VAND. J. TRANSNAT'L L. 459 (1988).

practice." For the purpose of customary lawmaking, state practice is norm-generative only if it is accompanied by an *opinio juris*.[22] Because no state has claimed that torture is lawful under international law, the practice of torture would not be able to create a law permissible of torture.

The other technique is to define state practice by pairing actions with responses from other states.[23] Whenever incidents of torture are exposed, they are deplored by other states and human rights organizations. It is the acts of torture by a state together with the collective responses from other states that constitute state practice on the legality of torture under international law. Both techniques are presented as factual matters of what to observe and what counts.

Second, observations and interpretations generate the world we see. Personal preferences, beliefs, values, or research methods often determine research outcomes. In essence, social science is about constructing narratives and order. Data only receive meaning when they are theoretically exposed and interpreted. Abebe, Chilton, and Ginsburg provide an illuminating example in their article. Using basically the same data, Beth Simmons and Eric Posner drew opposite conclusions about the effectiveness of international human rights agreements.[24]

Another useful example could be found on the scholarly examination of the breadth of the territorial sea. According to a survey conducted by the United Nations in 1983, 18 states claimed 3 nautical miles of territorial sea, 83 states claimed 12 nautical miles, 13 states claimed 200 nautical miles, and another 19 states claimed different ranges.[25] The question is then how far the territorial sea reaches under customary international law.

The above claims are open to different interpretations. One interpretation could simply deny the existence of customary international law on the subject matter, as state practices diverge.[26] Another interpretation may suggest the continued validity of the rule of 3 miles, as this is the least disputable.[27] Still

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22 *See* North Sea Continental Shelf, 1969 I.C.J. Rep. 3, at ¶ 77.

23 *See* Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 754, 784 (2001).

24 *See* Abebe et al., *supra* note 1, at 21 (discussing BETH SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009) and ERIC A. POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW (2014)).

25 *The Law of the Sea Bulletin, No. 2*, vi, U.N. Doc. 83-35821 (Dec. 1983).

26 Michael Byers therefore interprets the 3 nautical miles as a mistaken belief among scholars on the customary breadth of the territorial sea. *See* Michael Byers, *Custom, Power, and the Power of Rules - Customary International Law from an Interdisciplinary Perspective*, 17 MICH. J. INT'L L. 109, 173 (1995).

27 *See* R.Y. Jennings, *General Course on Principles of Public International Law*, 121 COLLECTED COURSES HAGUE ACAD. INT'L L. 323, 379 (1967). Yet, for a rational choice explanation of the 3 nautical miles rule and its subsequent development, see Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1158 (1999).

another interpretation points to the rule of 12 miles, as this rule is endorsed by the majority and also incorporates the latest development in state practice.[28]

All of the above interpretations stand equally. A choice can be made only by reference to policy considerations and normative commitments beyond mere factual observation. More importantly, the difference between interpretations is irresolvable within the social science approach itself as Abebe, Chilton, and Ginsburg seem to suggest.[29] The difference does not lie in observations, but rather in assumptions and orientations.

Third, by reducing itself to the study of what "is," the social science approach risks consolidating and legitimizing existing social structure and order. The social science approach gives authenticity to empirical facts and data by assuming that the truth may be meaningfully extracted from the given. Yet, what is the being, what aspects of social life are real, and what is observable are all at the heart of the positivism of social sciences. Objectifying certain aspects of social life to present them as irresistible and capable of generating meaning and order has profound intellectual, social, and political implications.[30] Having renounced a political commitment in the first place, the social science approach is left to be fed by dominant narratives about world reality. Expressly not committing oneself to a normative project amounts to a normative commitment in its own right.

IV. RELATING INTERNATIONAL LAW TO SOCIAL SCIENCES

The social science approach is primarily concerned with international law's efficacy and rationale. It focuses "on external questions like why states make international commitments, how international institutions make decisions, and whether international commitments or the decisions of international institutions produce changes in state behavior."[31] The social science approach, as such, incorporates rather specific parochial concepts of both international law and social science. This reductionist approach may hinder a more dynamic and interactive discourse between international law and social science.

The social science approach suffers from three reductionist deficiencies. The first is its positivistic conception of the social science method. In limiting itself to the empirical method and external explanation, the social science approach, as proposed by Abebe, Chilton, and Ginsburg,[32] minimizes the contributions of

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28 Those arguing for 200 nautical miles are not seen as persistent objectors to the customary rule of 12 nautical miles. *See* Bing Bing Jia, *The Relations Between Treaties and Custom*, 9 CHINESE J. INT'L L. 81, 89 (2010).

29 *See* Abebe et al., *supra* note 1, at 21–22.

30 For an insightful account of the ordering power of description, see Anne Orford, *In Praise of Description*, 25 LEIDEN J. INT'L L. 609 (2012).

31 *See* Abebe et al., *supra* note 1, at 18.

32 *Id.*

political science, anthropology, linguistics, or history. It focuses on efficacy and causality to the exclusion of other analytic paradigms, such as structural-functionalism, hermeneutics, critical theory, and systems theory.

The second reductionist aspect is its conception of international law. The social science approach incarnates a robust positivist and statist concept of law. International law is seen as consisting of binding rules and principles whose effects are to endure test by empiricism. However, in international society, the constitutive role of international law is as relevant as its normative function. While a rule-based formalistic notion of international law still stands firm, especially in international adjudication, other concepts receive increasing acceptance.

International law is a language of empowerment that legitimizes specific claims or actions. By formulating conceptual, paradigmatic, or epistemic frameworks, it conditions our understanding of international problems and defines the available solutions. The role and relevance of international law are much richer than what the positivistic concept may embrace.

The normativity of international law may be considered in a dual agenda: authoritative in adjudication and decision-making, but also normative in terms of its political commitments. The traditional approach presents it as a system of rule-based normativity without normative projects other than international law itself. Disconnecting these two levels of normativity is artificial and leads to the practical irrelevance of international law to international life.

The third reductionist aspect is the relationship between international law and social science. The social science approach depicts these as two distinct fields which only relate to each other externally. In fact, they are mutually constitutive. It is important to appreciate the constitutive role of concepts and doctrines of international law in the design of the research project, as well as in the interpretation of the results.

Nevertheless, an enriched social science approach would provide useful insights for developing international law projects. The mechanisms of causation and attribution are powerful institutions for social redistribution.[33] For example, the underlying causes of poverty in the Global South are subject to different interpretations. In turn, these different interpretations point to different prescriptions. Poverty may be seen as a consequence of the corruption and failure of local governments. It may also be attributed to the lack of legal institutions for privatization, property protection, or effective markets. Additionally, it may be attributable to the structural status of countries in the Global South in the international economic system. Each of these interpretations may be equally valid and yet points to different prescriptions. Here, causation plays an important role in conditioning our understanding of what the world problem is, who shall bear

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[33] For an insightful exposition and critique of causational analysis applied to human rights issues, see Susan Marks, *Human Rights and Root Causes*, 74 MOD. L. REV. 57 (2011).

responsibilities, and where to look for possible solutions. A social science project would be useful to substantiate the normative projects of international law regarding global poverty.

A modest and self-reflective social science approach is useful, but not because it provides objective, verifiable scientific knowledge. Rather, it offers a way to understand how international legal problems may be defined, how the order of the world may be depicted, and how politics of international law may be conducted at a micro level.

I would suggest an active incorporation of the social sciences into international law. Various arguments against international legal studies as a social science can be anticipated. Philosophically, the normative system of international law cannot be subjected to Popper's falsificationist approach, falling under the criteria of science.[34] Conceptually, the normative approach to law—sometimes referred to as the authority paradigm—tells very little about international society.[35] Intellectually, the social science approach often entertains skepticism or even hostility toward the legal nature of international law, and a call for interdisciplinary engagement often means conquest in reality.[36] Politically, much of the existing work on the social science approach is viewed as conservative. [37]

Yet, it is both important and possible to relate international law to social science in a more dynamic and mutually informative manner. There are several useful ways to relate the two subjects. The first possibility is to open the normative approach by relocating its background assumptions to the foreground for discussion.[38] In approaching international law as a project for social reform, it is useful to openly acknowledge the sociological assumptions and political ideals that underlie the international law project. To make those assumptions explicit would do away with the false normative objectivity that has been associated with international law. Connecting legal normativity with political normativity would enable more direct engagement with foundational ideas about the world in international legal discourse. And any reflections of those assumptions would practically require sociological investigation and political engagement.

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34 *See* KARL POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 40–42 (1959).

35 For discussion of the authority paradigm, see Geoffrey Samuel, *Is Law Really a Social Science? A View from Comparative Law*, 67 CAMBRIDGE L.J. 288 (2008).

36 *See* Jan Klabbers, *The Relative Autonomy of International Law or the Forgotten Politics of Interdisciplinarity*, 1 J. INT'L L. & INT'L REL. 35 (2005).

37 *See* Martti Koskenniemi, *Law, Teleology and International Relations: An Essay in Counterdisciplinarity*, 26 INT'L REL. 3, 16 (2012).

38 *See* DAVID KENNEDY, A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY 114 (2016).

A second way of relating is to openly examine the constitutive role of international law in social science.[39] International law today is a powerful institution that determines how international issues are framed and resolved. Its politics is often expressed in the politics of competing perspectives and outlooks. The empirical approach requires theoretical sensitivity in its normative assumptions, intellectual reflection about the subjective decisions made in selecting and processing data, and prudence when drawing normative conclusions from collected facts.

The third way of relating is to conduct interdisciplinary projects internal to international law. International law projects by themselves are capable of speaking to historians, political scientists, and scholars of international relations. As Jan Klabbers comments, "the best work in international law tends to be individual work that is well-informed about neighboring disciplines, and would be readable and understandable to those neighboring disciplines, and perhaps even contribute something to those disciplines, without however losing its distinctively legal character."[40] Those works are read as legal works *par excellence*. This raises interesting questions about what constitutes an internal approach to international law and where to draw its disciplinary boundaries. To conduct interdisciplinary projects internal to the discipline of international law would require international lawyers to be open-minded to the social sciences, and more importantly, be able to internalize those neighboring disciplines in the landscape of legal research.

V. CONCLUSION

What distinguishes international law from domestic law is its constitutive role for international society. International law always points to the future and is an enterprise that constantly aims to transcend the contemporary conditions of human life. International law has constantly been formulated by professionals as a project for social reform. International legal scholarship, the social science approach included, by itself is part of the international lawmaking process.

The legitimacy of international law should not take refuge in objectivity or scientism. The validity of international law may not come from an external verification through economics or sociology. A reductionistic social science approach to international law risks consolidating existing inequalities and imperialistic institutions in the name of objective science. Such an approach may also reduce international law to a set of policy options coded in administrative vocabulary. As international law constantly oscillates between faith, normativity, and theology on the one end and practice, facts, and science on the other, it is

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39 Early calls for such interdisciplinary collaboration go back to the 1980s. *See, e.g.*, Christopher C. Joyner, *Crossing the Great Divide: Views of a Political Scientist Wandering in the World of International Law*, 81 PROCEEDINGS ANN. MEETING AM. SOC'Y INT'L L. 385 (1987).

40 Klabbers, *supra* note 36, at 45.

important to steer it as an intellectual space for rational discourse, as well as a political space for progressive social projects.

A healthy interaction between international law and the social sciences requires enriched conceptions of both, as well as a proper perspective on their working relationship. It is important for international law to absorb a social-historical perspective and transform legal scholarship from an authority paradigm to a more socially informed and politically relevant intellectual project.